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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1952

No. 206

THE COUNTY OF MINERAL, STATE OF NEVADA, a Political Subdivision of the State of Nevada,

Petitioner,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and THE CALIFORNIA ELECTRIC POWER COMPANY, a corporation,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California.

BRIEF IN OPPOSITION FOR PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA.

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"Furthermore, there would then be no reason for having included Sec. 303 in the Act in order to make 'agencies of the United States' engaged in the sale of power subject to the provisions of Sections 301 and 302, so far as may be practicable. For those latter sections by their terms apply to every 'licensee,' and the agencies of the United States would be 'persons' requiring a license under Sec. 23(b)—'licensees.'

"Finally, it is significant that Sec. 3(13), in describing excluded donations, list of funds obtained from 'States, municipalities, individuals, *or others.*' The word 'others' has been interpreted by the Commission to include the United States, the word being looked upon as a catch-all. No word which could be considered a catch-all was used in Sec. 313(a) though Congress, as Sec. 3(13) shows, could have used such a word had it desired to do so.

"In the course of its passage through Congress, Sec. 313, which originally was drafted to give 'any person' the right to rehearing and review, was amended by adding 'State, municipality or State Commission.' This change made plain congressional recognition and intention that 'person' should not include governments, and that only State and municipal governmental units should be accorded rehearing and review.

"Sec. 313 as enacted was derived from S. 1725, 74th Cong. 1st Sess. The May 4, 1935, Confidential Print of S. 1725 shows, by underscoring the words italicized below, the additional language added in the Senate Committee:

"Sec. 309(a). Any person, *State, municipality or State commission* aggrieved by an order issued by the Commission in a proceeding under this Act to,

which such person, *State, municipality or State Commission* is a party may apply for a rehearing within thirty days after the issuance of such order * * *.

"From this action, it is abundantly clear that the Committee considered that 'person,' as used in the bill, bore a restricted meaning. And to give the precise coverage in the section which they desired, they added the words 'State, municipality or State commission' to 'person.' If the Committee had thought that 'person' included the United States, there would have been no necessity for making the change. For if 'person' then included the United States, it necessarily included also the lesser governmental units, States, municipalities and State commissions.

"Further, it is clear that when the Committee added 'State, municipality or State commission' they gave the right to ask for a rehearing only to those governmental units which they considered should have that right. If the Committee members had desired that the United States have such a right, it would have been a simple matter for them to have included the United States. This the Committee did not do."

Petitioner argues, however (Pet. pp. 13-18), that this Court should strike out and ignore the words, "to any person," as they occur in Section 201(d) of the act, because they were inserted by amendment as the bill passed through Congress and no mention of the critical words was made in the Committee reports. This seems to be carrying legislative history beyond the limit of tolerance.

The provisions referred to are not ambiguous or uncertain, but are clear, specific, and capable of enforcement. There is no occasion to resort to legislative history.

Petitioner's contention virtually announces a general rule that, *where a bill is amended in its legislative course, no critical words inserted by the amendment will be given effect by the courts unless the amendment is accompanied by a Committee report expressly mentioning an intent to insert such critical words.*

The point made by Petitioner is obviously one which should be addressed only to Congress.

The decision in Wisconsin-Michigan Power Co. v. Fed. Power Com., 197 F. 2d 472 (C. A. 7), *loc. cit.* 479, relied upon by Petitioner, is not persuasive. That Court seems to have assumed too much, viz., that "the apparent inconsistency was an oversight," and that the "'slip' was inadvertent." Moreover, in placing its decision on "the continued construction of the Act by the Commission," that Court was directly in conflict with the District of Columbia Circuit in *Pacific P. & L. Co. v. Fed. Power Com.*, 184 F. 2d 272, holding that twenty years of administrative construction by the issuance of numerous licenses for minor lines under the claim of jurisdiction to do so did not alter the statute, though the meaning of the statute was, to say the least, debatable.

Petitioner argues further that this Court should disregard the words "to any person," because to give them effect would be unreasonable in that it would deny to the state the benefit of one phase of federal regulation. But this is a mere conclusion of the pleader, and defeats itself, since it is admitted that Congress did deny to the state some degree of federal regulation. This is so, because

rates for energy sold in interstate commerce for consumption by the purchaser are not subject to Federal Power Commission jurisdiction.[4]

The argument that *Attleboro,* 273 U. S. 83, exposed the gap in regulation as to wholesale sales to both public utilities and non-public utilities and, hence, the act was intended to close the gap as to one as well as to the other, fails to convince. There are three possible gaps: (1) sales to public utilities for resale, (2) sales to governmental agencies for resale, and (3) sales to any one for consumption. The act did not close the gap as to (3), why must it have closed the gap as to (2)? Actually Sec. 201(a), (b) and (d) closes only the gap exposed in *Attleboro,* that is, (1) above, or sale in interstate commerce to a privately owned utility for resale. The inclusion of anything more rests entirely upon the wish or desire of the Petitioner or Federal Power Commission, and cannot be read into the act by an impartial examination.

The intent of Congress to exclude sales to Mineral County and Subdivisions and agencies of a state through the definition of the word, "person," in Section 201(d) is clear, for it conforms to the same intent manifested in the exclusion of those agencies in Section 201(f), and both results comport with the undoubted intent of Congress not to bring federal regulation unnecessarily into opposition to the sovereignty of the states.

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[4] *Fed. Power Com. v. Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 502; *Panhandle Eastern Pipe Line Co. v. Public Service Com.*, 332 U. S. 507; *Panhandle Eastern Pipe Line Co. v. Fed. Power Com.*, 341 U. S. 329; *Connecticut L. & P. Co. v. Fed. Power Com.*, 324 U. S. 515, 529.

IV.

Under the Facts of This Case, Company's Rates Are Subject to Regulation Solely by a State Commission or State Commissions Under Sections 19 and 20 of the Act.

Sections 19 and 20 provide for the regulation of all of a licensee's rates, not merely those for the sale of power from licensed projects. Section 19 provides that every licensee which is a public service corporation (some are not) shall be subject to regulation by the state where the service is rendered or the rate charged, in this case, California. Section 20 provides that, if such power or any part thereof enters into interstate commerce, and if any of the states directly concerned has not provided a Commission to regulate the rates or such Commissions are unable to agree, then, jurisdiction is conferred on Federal Power Commission.

Under those provisions, it is immaterial whether or not interstate commerce be involved, for in neither event does Federal Power Commission have jurisdiction, there being no evidence in this case that any state commissions are unable to agree.

Since, under the facts of this case, regulation by a state or states has been provided for, Federal Power Commission has no jurisdiction under Part II of the act, it being provided in Section 201(a) that federal regulation under that part is "to extend only to those matters which are not subject to regulation by the States."

It will be observed that, as applied to various conditions, Sections 19 and 20 provide for some regulation of interstate commerce by states and for some regulation of intrastate commerce by federal agency. The explanation of

what ordinarily would not conform to the powers of Congress under the Commerce clause lies in the fact that Part I of the act was not enacted primarily under the commerce clause, but under Section 3 of Article IV of the Constitution, giving Congress power "to dispose of, and to make all needful rules and regulations respecting the territory and other property of the United States."

The Company's licenses are 50-year contracts in the nature of leases of public lands, founded on mutual benefits and detriments to the parties. In making such disposition of the property of the United States, Congress can attach any conditions it wishes[5] unrestricted by the Commerce Clause as to distinctions between intrastate and interstate commerce. As a term of the lease, it could have made all commerce resulting from the operation of the projects, both intrastate and interstate, subject to state regulation, or all subject to federal regulation, or it could provide, as it in fact did provide, that in the first instance all rates should be subject to state regulation, which, under certain conditions should give way to federal regulation.

Pennsylvania Water & Power Co., 343 U. S. 414, and *Safe Harbor Water Power Co.*, 179 F. 2d 179 (C. A. 3) (certiorari denied 339 U. S. 957), are not contrary to but confirmatory of these principles. In both cases, interstate commerce being indisputably involved; it was found that the state commissions were unable to agree, thus under the express provisions of Section 20 of the act, transferring jurisdiction to Federal Power Commission.

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[5] *Camfield v. United States*, 167 U. S. 518; *Light v. United States*, 220 U. S. 523.

We understand that a judicial decision is authoritative only for the law as applied to the facts of that case. There is nothing in either case explaining what would be the consequences in the absence of the critical finding that the state commissions were unable to agree. There we would have power to regulate conferred on both state and federal commissions, precipitating an incongruous condition.

Neither of the two decisions last mentioned makes any disposition of this apparent conflict. In *Safe Harbor Water Power Co. (supra)*, the Third Circuit definitely held that Part II did not repeal Sections 19 or 20 of Part I, and in *Pennsylvania Water & Power Co* this Court did not discuss the point, except to say (72 S. Ct. pp. 845-846):

> "It may be possible that some future case will develop minor inconsistencies in the administration of the two Parts. Today's case, however, is not such a one."

Evidently, this Court intended to limit its decision to the facts of that case and not to decide other facts by dictum.

In first *Safe Harbor*, 124 F. 2d 800 (C. A. 3), it was held that, where interstate wholesale rates of a licensee were involved and there was no evidence that the State Commissions were unable to agree, Federal Power Commission had no jurisdiction. This seems to be supported by *Alabama Power Company*, 128 F. 2d 280, and *Niagara Falls Power Co.*, 137 F. 2d 787.

Following the decision in first *Safe Harbor*, a change in facts occurred in that Public Service Commission of Maryland on August 30, 1944, addressed a letter to Federal Power Commission asking it to conduct an investigation of the interstate rates between Pennsylvania and Maryland, which letter formed the basis for the finding in both cases relied upon by Petitioner (*Second Safe Harbor* and *Pennsylvania W. & P. Co.*) that the two state commissions were unable to agree, thereby vesting jurisdiction in Federal Power Commission under Section 20.

The writ should be denied.

Respectfully submitted,

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Attorneys for California Electric Power Company.

4. THE THREE REASONS SPECIFIED BY MINERAL COUNTY FOR GRANTING A WRIT ARE INSUBSTANTIAL.

Mineral County argues (Petition, 6, 7) (a) that the California Commission was not justified in construing the Federal Power Act literally and should instead have reached a conclusion similar to that in *Wisconsin-Michigan Power Company v. Federal Power Commission*, 197 F. 2d 472 (7th Cir., June 9, 1952); (b) that the California Commission premised its decision upon a proposition declared unsound in *Pennsylvania Water and Power Company v. Federal Power Commission*, 343 U.S. 414 (May 26, 1952); (c) that it was erroneous for the California Commission to find the Nevada Public Service Commission to be the kind of regulatory commission contemplated by Section 20 of the Federal Power Act. These three arguments do not justify certiorari as will be demonstrated in the following:

a. The Wisconsin-Michigan case.

So far as here pertinent the Seventh Circuit held in *Wisconsin-Michigan Power Company v. Federal Power Commission*, 197 F. 2d 472 (7th Cir., June 9, 1952), (*Wisconsin-Michigan Power Co. v. Federal Power Commission*, No. 291, Oct. Term, 1952; *Wisconsin v. Federal Power Commission*, No. 294, Oct. Term, 1952), that sales of electric energy by a public utility to a municipality for resale by the latter fall within the purview of the term "sale of electric energy at wholesale" (Section 201(b)), that is, "sale of electric energy to any person for resale" (Section 201(d)), notwithstanding the fact that municipalities and other political subdivisions of a

state are expressly excluded from the definition of "person" in Section 3(4).

The Court recognized that its conclusion was contrary to the literal meaning of the statute (197 F. 2d at 479) but was persuaded by Government counsel to reject the literal meaning as an "oversight," an inadvertent "slip" on the part of Congress.

It would not be appropriate here to refute in detail the numerous invalid hypotheses which the Government pressed upon the Seventh Circuit in urging that Congress did not know what it was doing in defining sales at wholesale. It is sufficient to point out that the Court was asked to impute to a word a meaning diametrically contrary to the express definition thereof in the same statute, casting aside the principle of statutory construction that the plain meaning of a statute must be accepted in the absence of manifest error and substituting in its stead a presumption of careless draftsmanship.

The legislative history leaves no mistake that Congress in enacting Part II of the Federal Power Act was dealing specifically with a gap revealed in the *Attleboro* case (*Public Utilities Commission v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927)) where one utility sells in interstate commerce to another *utility* for resale. See *Connecticut Light and Power Co. v. Federal Power Commission*, 324 U.S. 515 (1945). A political subdivision is not in the same category as a public utility. Utilities as private enterprises are not necessarily primarily concerned with the cost to the consumer. If they agree to make wholesale purchases at an improvident rate, there is a

danger that they may seek to pass that cost on to the retail consumers. Political subdivisions, on the other hand, have an identity of interest with their consumers. The same danger of improvident wholesale rates does not exist. The policy of Congress in enacting Part II was to protect consumers who needed protection, not those who did not. Certainly political subdivisions themselves do not need the intervention of a federal protector, and their consumers are amply protected by those political subdivisions.

The *Wisconsin-Michigan* case is currently the subject of two petitions for writs of certiorari filed in this Court, Nos. 291, 294, this term.

b. The Penn Water case.

In *Pennsylvania Water and Power Company v. Federal Power Commission*, 343 U.S. 414 (May 26, 1952), this Court dealt with the contention that Penn Water, as a type of "public utility" subject to regulation under Part II, was nevertheless not subject to regulation thereunder because it was a licensee subject to regulation under Part I. This Court rejected the contention, saying (343 U.S. at 418):

> "It would hinder, not help, the Power Act's program if we should impliedly exempt Part I licensees from the more expansive Part II regulation. It may be possible that some future cases will develop minor inconsistencies in the administration of the two Parts. Today's case, however, is not such a one. We hold that Penn Water is subject to regulation under Part II of the Act. It is also subject to Part I regulation since the Commission found on substan-

tial evidence, as the court below held, that the States were 'unable to agree' within the meaning of Section 20 of Part I of the Act."

The decision of the California Commission is consistent with this language. The following paragraph outlines the California Commission's reasoning.

If Part I alone of the Federal Power Act were assumed to exist, the machinery set up by Congress in Section 20, to enable states under certain conditions to exercise jurisdiction without burdening interstate commerce, would be available and make it possible for California to regulate the sales to Mineral County, since California and Nevada were not shown unable to agree on the rates fixed by the California Commission. It follows that since state jurisdiction would have been allowed prior to the enactment of Part II by virtue of the machinery alluded to, Part II by its own terms in Sections 201(a) and 201(b) operated to deny Federal Power Commission jurisdiction since those sections expressly reserve to the states whatever jurisdiction they possessed prior to the enactment of Part II.

We find nothing in the *Penn Water* case to invalidate the ground of the California Commission as thus stated. It must be remembered that the *Penn Water* case did not involve facts showing an absence of disagreement between two states. Whenever the states *are* shown unable to agree, as in the *Penn Water* case, the machinery of Section 20 to preserve state jurisdiction is not available and accordingly Sections 201(a) and 201(b) cannot be in-

voked to preclude Federal Power Commission jurisdiction.

c. The Nevada Public Service Commission is the kind of regulatory commission contemplated by Section 20, and Nevada was not shown unable to agree on the rate fixed for sales to Mineral County.

The Nevada Public Service Commission clearly has jurisdiction over the rates Mineral County charges its consumers. Nevada Statutes, 1925, page 55, Section 16, provides:

> "Sec. 16. The maintenance and operations of said Mineral County Power System shall be under the control, supervision and authority of the board of managers and rates charged to consumers for sale and distribution of electric energy and current, and the tolls from telephone service, with the terms and conditions thereof, shall be fixed by said board, *subject to supervision of the Nevada Public Service Commission, who may revise, raise or lower the same.*" (Emphasis added.)

Mineral County fails to cite this provision in the Nevada law. It quotes certain other Nevada statutory provisions (Petition, 13) presumably with the intent of showing that since the Nevada Public Service Commission has no authority outside Nevada and no authority either within or outside Nevada over wholesalers of electric energy, it is disqualified under Section 20. But under Section 20 the state commission must be one:

> ". . . to enforce the requirements of Section 20 within such state . . ."

"Requirements" refers to the provision that the rates and services by licensees or persons purchasing from licensees for resale in public service shall be reasonable. Since the Nevada Public Service Commission clearly has jurisdiction over the reasonableness of the rates charged by Mineral County to its ultimate consumers, i.e., jurisdiction over the reasonableness of the rates charged by one purchasing from a licensee for resale within Nevada; it qualifies under Section 20 and it is quite immaterial that it lacks extraterritorial powers or any other powers. Congress certainly did not intend that state commissions, to qualify under Section 20, must have extra-territorial powers, powers in conflict with the sovereign rights of a sister state, nor did it use language even suggesting such an incongruous condition. It took care to use the phrase "within such state" in defining the powers a commission must have to qualify.

Mineral County argues that even if the Nevada Public Service Commission is a qualified commission it "made no attempt to exercise any powers in this matter [as] is evidenced by the statement of the Chairman at the concurrent hearing of the two Commissions [the Federal Power Commission and the California Commission] (R. 24)." The statement of the chairman, however, was simply that the Nevada Public Service Commission was maintaining a neutral position on the question whether the California Commission or the Federal Power Commission had jurisdiction, and it in no sense constituted a statement, as Mineral County improperly suggests, that the Nevada

Public Service Commission was ignoring its supervisory jurisdiction over Mineral County's rates to its consumers.

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5. IT IS NOT TRUE THAT MINERAL COUNTY IS LEFT, UNDER THE DECISION OF THE CALIFORNIA COMMISSION, "WITH THE DUBIOUS PROTECTION OF RATE REGULATION BY A COMMISSION OF ANOTHER STATE . . ." (Petition, 8).

The California Commission's decision proceeds upon the *admitted fact* that there has been no showing of inability to agree on the rates fixed by California for the sales by California Electric Power Company to Mineral County. Under Section 20, should Nevada at some future time register disagreement over the rates in question, the California Commission's jurisdiction will automatically cease, and Federal Power Commission jurisdiction will take over. Thus if Mineral County is now dissatisfied with the rate which the California Commission has prescribed, its remedy is simple enough. All it need do is persuade the properly constituted state authorities of Nevada to register disagreement with the State of California. The California Commission's jurisdiction will then cease.[5]

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[5]This presupposes, of course, that the sales are in interstate commerce and that Section 20 applies. If the sales are eventually found to be in *intra*state commerce, Section 19 would apply and California jurisdiction would be retained.

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CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Dated, San Francisco, California,
September 15, 1952.

Respectfully submitted,

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